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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
	)	

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OPPOSITION TO WINSTAR COMMUNICATIONS, INC. PETITION FOR CLARIFICATION OR RECONSIDERATION

Duquesne Light Company, by its attorneys and pursuant to 1.429(f) of the Commission's Rules of Practice and Procedure in Title 47, Code of Federal Regulations, hereby opposes the WinStar Communications, Inc. Petition for Clarification or Reconsideration (the "WinStar Petition") filed in the above-captioned docket on September 30, 1996, and which was placed on public notice on October 10, 1996.

I. INTRODUCTION

Duquesne Light Company is an electric utility engaged in the production, transmission, distribution, and sale of electric energy. Its service territory is approximately 800 square miles in southwestern Pennsylvania, including Pittsburgh, with a population of over 1.5 million. In addition to serving more than 580,000 retail customers, the company sells electricity at wholesale to other utilities. Duquesne is a forward-thinking utility which has introduced one of the first comprehensive customer service guarantee programs in the nation. Duquesne owns many thousands of distribution poles and controls numerous ducts, conduits, and rights-of-way, all of which are

part of its core infrastructure by which it provides electric service. Duquesne has a vital interest in the outcome of this proceeding. Duquesne participated in this proceeding by submitting its Comments on May 20, 1996 and a Petition for Reconsideration and Clarification on September 30, 1996. Duquesne also participated in this proceeding as a member utility of the Edison Electric Institute ("EEI") and UTC, The Telecommunications Association ("UTC") through the joint comments, joint reply comments, and a joint petition for reconsideration and clarification submitted by EEI and UTC on behalf of their members.

The WinStar Petition

> requests that the Commission clarify WinStar's right, where it operates as a facilities-based competitive local carrier, to locate its 38 GHz microwave equipment on the roof of utility premises and to utilize related riser conduit owned or controlled by the utility, in order to provide competitive local services to end user customers, as well as for purposes of interconnection.

WinStar Petition at 2.

WinStar classifies this request as a "minor clarification." Id. However, the "minor clarification" sought by WinStar would, if granted, constitute a 180 degree reversal of the Commission's interpretation of section 224(f). A fair reading of the First Report and Order[1/] reveals that the Commission squarely faced the issue of mandating access to utility rooftops, and for good reason rejected WinStar's argument that section 224(f)(1) mandates such access. The Commission's analysis in the First Report and Order was correct, and the Commission should deny the "minor clarification" sought by WinStar.

1/ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, FCC 96-325 (CC Docket No. 96-98 Aug. 8, 1996) ("First Report and Order").

II. THE COMMISSION REJECTED THE ARGUMENT THAT SECTION 224(f)(1) MANDATES ACCESS TO UTILITY ROOFTOPS

In its initial Comments, WinStar clearly articulated its argument that the mandatory access provisions of Section 224(f)(1) require the Commission to mandate access to utility rooftops for the purpose of placement of towers to support WinStar's microwave transmission facilities and use of riser conduit for interconnection. See WinStar Comments at 2-6 (CC Docket No. 96-98 May 20, 1996). The issue was further crystallized by reply comments submitted by the electric utility industry. See, e.g., Reply Comments of Ohio Edison Company 11-12 (CC Docket No. 96-98 June 3, 1996) ("Ohio Edison Reply Comments"); Reply Comments of Public Service Company of New Mexico 8 (CC Docket No. 96-98).

The Commission's response to WinStar's argument was direct and unambiguous:

> We do not believe that section 224(f)(1) mandates that a utility make space available on the roof of its corporate offices for installation of a telecommunications carrier's transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled elements under section 251(c)(6). The intent of Congress is section 224(f)(1) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by a utility.

First Report and Order ¶ 1185 (footnotes omitted).

The Commission's statement requires no "minor clarification." Plain and simple, it rejects the WinStar's argument that the terms "pole, duct, conduit, or right-of-way" in section 224(f)(1) includes utility buildings. The Commission did recognize that different treatment may be appropriate with respect to the facilities of an incumbent LEC (which is subject to section 251(c)(6) as well as to section 224(f)(1)) in contrast to the facilities of a non-LEC utility (which is subject only

to section 224(f)(1)). Thus, WinStar does not seek a "minor clarification," but complete reversal of the Commission's well-reasoned statutory interpretation. As shown below, WinStar has failed to demonstrate that the Commission should do so.

III. THE COMMISSION'S INTERPRETATION THAT SECTION 224(f)(1) DOES NOT MANDATE ACCESS TO UTILITY ROOFTOPS IS CORRECT

Section 224(f)(1) mandates access to utility "poles, ducts, conduits, and rights-of-way." 47 U.S.C. § 224(f)(1) (1994). Section 224 is the only section of the Communications Act of 1934 which is applicable to electric utilities and addresses third-party access to utility infrastructure. Of particular importance to the issue presented by the WinStar Petition, incumbent LECs are subject not only to the mandatory access provisions of section 224(f)(1), but also to the physical collocation provisions of section 251(c)(6). Section 251(c)(6) is demonstrably broader in its application than section 224(f)(1), in that it mandates access to all "premises" of local exchange carriers.[2/]

WinStar has failed to provide any specific justification, from either the statutory language or legislative history, to support its argument that Congress intended to include all electric utility real property within the scope of the terms "poles, ducts, conduits, and rights-of-way." See WinStar Petition passim; WinStar Comments at 2-6. Indeed, a well-established rule of statutory construction, *expresso unius est exclusio alterius*,[3/] creates a strong inference that Congress, in

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2/ Duquesne takes no position with respect to whether section 251(c)(6) might require an incumbent LEC to provide access to its central office rooftops and riser conduit as an unbundled network element.

3/ The inclusion of one thing is the exclusion of another.

creating so specific a listing of utility property subject to section 224(f)(1) jurisdiction, necessarily intended to exclude from such jurisdiction other types of utility property.[4/]

The rooftop of a utility building is most definitely not a pole, duct, or conduit. Even the most liberal construction of those terms clearly excludes a rooftop. WinStar argues that rooftops are included within the term "right-of-way." See WinStar Petition at 7. WinStar's sole basis for such argument is not an analysis of the language or history of section 224(f)(1), but its assertion that mandatory access to such facilities is critical to WinStar's business plans. The fact that WinStar may need access to such facilities is irrelevant to the Commission's proper inquiry: Whether Congress intended that an electric utility rooftop to be included within the term "right-of-way."

As noted by Ohio Edison, the term "right-of-way" has a very specific meaning in the electric utility industry, referring to "a specific pathway, often by grant of easement over property owned in fee by others, for specific transmission and distribution conductors. It most certainly does not include any utility buildings or power plants." See Ohio Edison Reply Comments at 12. Another principle of statutory construction is that in the absence of evidence to the contrary, Congress intends that words used in a statute should be interpreted in accordance with their normal usage. See McNally v. United States, 483 U.S. 350, 358-59 (1987); Indiana-Michigan Power Company v. U.S. Department of Energy, 88 F.3d 1272, 1275 (D.C. Cir. 1996). WinStar has provided no evidence that Congress intended that all utility real property be included within the scope of the term "rights-of-way" as used in section 224(f)(1). Accordingly, the Commission properly interpreted section 224(f)(1) to determine that it has no authority to order mandatory access to

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[4/] See 2A Norman J. Singer, Statutes and Statutory Construction § 47.23 (1996).

utility rooftops as "rights-of-way." The Commission should not reconsider that proper conclusion.

CONCLUSION

For the foregoing reasons, the Commission should decline to clarify or reconsider the First Report and Order to issue the clarification sought by WinStar Communications, Inc.

Respectfully submitted,

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October 23, 1996

CERTIFICATE OF SERVICE

I, Norman J. Fry, do hereby certify that a true and correct copy of the foregoing document was sent by first-class mail, postage prepaid, on this 23rd day of October, 1996, to the following persons:

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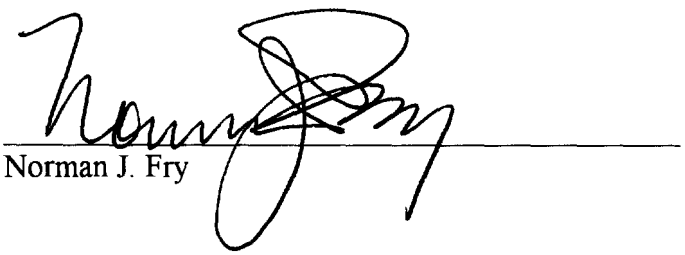

Norman J. Fry